***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

ORIGINAL

74-1580

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P/S

IN THE

# United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-1580

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

v.

SAMUEL KAPLAN

*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

## DEFENDANT-APPELLANT'S BRIEF

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# BRIEF FOR APPELLANT SAMUEL KAPLAN

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## Preliminary Statement

The Appellant, SAMUEL KAPLAN, appeals from a Judgment of Conviction in the United States District Court for the Eastern District of New York, adjudging him guilty of two counts of violating Title 21, United States Code, Section 841(a)(1). As a result of this conviction, the Appellant was sentenced to the custody of the Attorney General, or his duly authorized representative, for a period of eight (8)

years on each count, the terms to run concurrently. The Appellant is presently at liberty on bail pending appeal.

The Indictment appears on page 4 of the Appellant's Appendix.

## STATEMENT OF THE FACTS

In this relatively short trial, the Appellant, SAMUEL KAPLAN, was convicted for his alleged participation in the sale of approximately one ounce of heroin to an undercover agent of the Drug Enforcement Administration.

The Government's case rested essentially on the testimony of Nicholas Alleva, the Federal Agent who purchased the narcotic on January 6th, 1972. Alleva testified that in the Fall of 1971, he had several negotiations and had made one purchase of what was presumably heroin from one Frank Lange. (T 22 - 25)[1, 2]

After a telephone conversation with Lange on January 5th, 1972, the agent went on the following day, January 6th, to

[1]Lange was originally named as a co-defendant with KAPLAN, but died prior to trial. As a result, the first Indictment was superseded by the instant pleading which names KAPLAN alone.

[2]The letter "A" introduces reference to the Appellant's Appendix while the letter "T" refers to the trial transcript.

Lange's residence in Brooklyn to make another purchase and ultimately arrest the alleged vendors. (T 25)

Entering the Lange home, where the deceased then lived with his parents and sister, Lange allegedly summoned the agent to his second-floor bedroom where the witness encountered the Appellant, KAPLAN. (T 27) On cross-examination, Alleva testified that he had never seen KAPLAN prior to this meeting. (T 72)

After pleasantries were exchanged between Lange and the agent, Lange obtained a clear plastic bag containing what was later determined to be heroin from a night-table drawer. (T 27 - 28) Attempting to draw KAPLAN into the conversation, the agent allegedly said "to both of them" that one of the pair would have to accompany him to his car to get the money. (T 28) Feigned distrust by Agent Alleva was followed by a conversation in which the agent complained to Lange and KAPLAN collectively that a prior transaction was not to his satisfaction. (T 29 - 30) According to Alleva, KAPLAN ended the bickering by directing Lange to "go down and get the money". (T 30)

Continued inquiry by Agent Alleva as to the quality of the narcotics allegedly elicited KAPLAN's assurance that

"it's five hit stuff", which in the parlance of the illicit drug trade is reportedly a testament to its purity. (A 37)

After allegedly receiving this guarantee of quality, Alleva left the house with Lange and proceeded to a Government vehicle parked outside. (A 40) While Lange waited for his money, a test was performed on the white powder which proved that the package contained heroin. (A 40 - 41) Lange was then told that the money for the package was in the trunk of the vehicle. However, as is now almost routinely familiar, the opening of the trunk was a pre-arranged signal to surveilling agents to move in and arrest the participants. (A-41)

Larry Burstein, another agent of the Drug Enforcement Administration, testified that on January 6th, 1972, he was surveilling the Lange residence at the time the above described activity took place. (T 100 - 101) Burstein testified that as Agent Alleva and Lange were in the vicinity of the Government automobile, completing what Lange thought to be a sale of heroin, he saw the Appellant, KAPLAN, exit the Lange home, make a brief observation of Alleva and Lange and then walk away from the house toward his own vehicle. (T 103 - 104) After Burstein made these observations, he placed the Appellant under arrest. (T 104)

On the defense case, Patricia Ruggiero testified that she was Frank Lange's sister and that KAPLAN had been a friend of the family for approximately six years. (T 114) Mrs. Ruggiero testified that on the date in question, she had remained home because of illness. (T 116) The witness then related that KAPLAN had come to the house that afternoon on a social visit and was attempting to convince her brother to return to work. (T 119) KAPLAN, who had previously employed young Lange, told the family that he could aid the young man in getting employment. (T 120) Mrs. Ruggiero then recalled that KAPLAN and her brother went to the latter's bedroom for the purpose of placing a telephone call to a prospective employer. (T 120)

Thereafter, according to the witness, a man and woman, who were described as friends of Frank Lange's, entered the house and were guided to the witness' bedroom while KAPLAN placed the phone call. (T 121) During this time also, Frank Lange alone entered into conversation with the unidentified couple while KAPLAN remained seated in the kitchen. (T 121)

Shortly thereafter, Agent Alleva entered the house and the witness recalled that after some ten minutes, left with her brother. (T 121 - 122) KAPLAN then told the witness that

he, too, would have to leave. (T 122) Finally, the young couple who remained in the witness' bedroom were seen to be looking out a window and, presumably observing the arrest, were overheard to say "something is wrong" and immediately departed through a back door. (T 123)

The Appellant, SAMUEL KAPLAN, testifying in his own behalf, flatly denied any participation in the possession or sale of narcotic drugs. KAPLAN testified that he enjoyed a social relationship with the Lange family, having met them through Frank whom he employed as a helper in the installation of carpeting. (T 144 - 145) Prior to the incident in question, KAPLAN, unaware of any involvement in narcotics, lectured the young man because of his unsteady work habits and offered help in Lange's unsuccessful attempts to gain employment. (T 147)

On January 6th, the day in question, KAPLAN described his presence at the Lange home and stated that the purpose of his visit was to aid Lange in finding employment. (T 147) Before going to Lange's bedroom to make a telephone call on his behalf, the Appellant observed a young man and woman enter the house. While the defendant-witness remained in the kitchen

with Lange's mother and sister, Lange excused himself and went upstairs with the couple. (T 148 - 149) A short while later, Lange asked the couple to wait in his sister's room while KAPLAN came into the deceased's bedroom to make a telephone call. (T 149)

While in the bedroom, Agent Alleva entered and in front of KAPLAN was handed a package containing the heroin. KAPLAN, then suspecting what was occurring, told Alleva and Lange that what they were doing was wrong and that Lange should get out of his family's house. (T 149) The clearly defined question for the jury, therefore, was whether they believed the uncorroborated testimony of Agent Alleva or the corroborated testimony of the Appellant, KAPLAN.

## STATUTES INVOLVED

Title 21, United States Code, Section 841(a)(1) states as follows:

> "(a) Except as authorized by this subchapter, it shall be unlawful for any person knowing or intentionally --
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or ..."

## QUESTIONS PRESENTED

1. Whether the Trial Court's failure to instruct the jury that the Appellant was presumed to be innocent was reversible error?

2. Whether the Appellant's Constitutional right to confrontation of the witnesses against him was denied by the introduction of statements of his deceased co-defendant prior to the date of the alleged narcotics transaction?

3. Whether the Trial Court's instructions on the element of knowledge in effect directed the jury to disregard the Appellant's testimony?

## POINT I

### THE TRIAL COURT'S FAILURE TO CHARGE THE JURY THAT THE APPELLANT WAS PRESUMED TO BE INNOCENT, ON THE PARTICULAR FACTS OF THIS CASE, CONSTITUTED REVERSIBLE ERROR.

In a rather bizzare occurrance, the Trial Court failed to instruct the jury that the Appellant, SAMUEL KAPLAN, was presumed to be innocent. There was no exception taken.

Appellant recognizes that there have been a number of cases decided in this Circuit which hold that such an

omission from a Trial Court's charge does not constitute plain error. RULE 52(b), F.R.C.P.; UNITED STATES v. MC GUIRE, 64 F.2d 485, 493 (2nd Cir., 1933); UNITED STATES v. PRIVATE BRANDS, 250 F.2d 554 (2nd Cir., 1947). See also, UNITED STATES EX REL COMPAGNE v. FOLLETTE, 306 F.Supp. 1255 (E.D.N.Y., 1969).[3] However, in the face of this authority, Appellant submits that on the peculiar facts of this case, a reversal is warranted.

To more easily structure Appellant's claim, reference is drawn to a post-verdict hearing held before the District Court on this very question.[4] It was demonstrated at this hearing that counsel, prior to the conclusion of the case, had been supplied with a typewritten copy of the Court's proposed charge.[5] (Footnote appears on next page) In the draft of the charge, specific reference to the presumption of innocence is present. It was there stated that:

[3] There is also authority to support the proposition that omission of the charge on presumption of innocence is plain error even where exception is absent. MC DONALD v. UNITED STATES, 284 F.2d 233 (D.C. Cir., 1960).

[4] The transcript of the brief hearing on Appellant's application to set aside the verdict based on this omission from the charge appears in Appellant's Appendix at pp. 124-132.

> "The government has the burden of proving guilt beyond a reasonable doubt with respect to every element of each crime. A defendant does not have to prove his innocence. A defendant need not submit any evidence at all. On the contrary, he is presumed to be innocent. The fact that a defendant does not testify creates no inference against him. He has a constitutional right not to testify." (A 104, emphasis supplied)

The fact that the presumption of innocence charge appeared in the typewritten instructions, of course, obviated the necessity for a specific request in this area. This would distinguish, at least in part, the instant case from, for example, UNITED STATES v. PRIVATE BRANDS (SUPRA).

In the actual charge to the jury, the stenographic transcript reflects that this essential instruction was omitted. Apparently paraphrasing the draft, the Court charged as follows:

> "The government has the burden of proving guilt beyond a reasonable doubt with respect to each element of the two offenses the defendant is charged with committing. The defendant doesn't have to prove his innocence. He doesn't have to take

[5] A copy of the proposed charge, marked as Court's Exhibit 1, appears in the Appellant's Appendix at pp. 103 - 112.

> the witness stand. The burden of proof beyond a reasonable doubt lies with the government right through the trial." (A 113 - 114)

As indicated at the post-verdict hearing, the stenographic transcript had been compared with the court reporter's actual notes. (A 106 - 107)

The apparently inadvertent omission of reference to the presumption of innocence can only be described as mechanical. Appellant does not take the position that in every case where a Court fails to charge on the presumption of innocence, that failure has a talismanic effect from which convictions simply disappear. It is submitted rather that in each case where such an omission occurs, a singular determination must be made on the facts there presented.[6] It is here submitted that such an analysis of the case at bar could produce a finding that the Appellant was prejudiced by this omission.

Certainly, actual prejudice could never be demonstrated in this type of situation. In relation to the length of the

[6]Research on this issue has demonstrated that such an occurrance is rare indeed and the frequency of a case by case determination would probably be measured in decades.

trial, the jury deliberated for a considerable period of time on a narrowly defined issue. That is, did the triers of the facts believe the Appellant or the Federal agent? The closeness of the issue demonstrates that the presumption of innocence could have reasonably weighed heavily in the Appellant's favor. This was not a case where the Government's proof was overwhelming with the defense resting on mere denial. In view of the well-established fact that the Government witness, Agent Alleva, was not presumed to be telling the truth, UNITED STATES v. SANTANA, 485 F.2d 365 (2nd Cir., 1973), the presumption of innocence could well have carried the day.

Appellant does not contest the Trial Court's assertion that the jurors were told about the presumption of innocence at the time they were chosen. (A 107) In fact, during the evidentiary portion of the trial, the jury was reminded of the presumption in response to a defense objection.

> "Q. Tell the jury what you mean by an undercover capacity?
>
> A. By acting undercover, you assume some other identity and try to either purchase narcotic drugs as evidence or gather intelligence by associating with certain alleged criminals. This is done -

MR. LA ROSSA: I object and move this be stricken.

THE COURT: Strike it. This defendant is presumed to be innocent." (A 27 - 28)

Although this admonition was certainly correct, it is Appellant's position that these early pronouncements of the presumption, coupled with the Court's failure to mention the concept in his charge, serves only to have increased the possibility of prejudice. Plainly stated, the jury was told before and during the Government's case that the defendant was presumed to be innocent. Thereafter, reference to that presumption, more particularly in the Court's explanation of the appropriate legal principles, was conspicuously absent. There was, therefore, a clear invitation to reason that now that the defense case had ended and the factual question defined, the Government and the Appellant stood on equal footing. As the Court stated:

> "Obviously, in this case an important matter for you to determine is credibility. Which witnesses were telling the truth? Which lied, and in which respect? There was a clear conflict between the defendant's testimony and the agent's testimony with respect to what the defendant did and said in that room." (A 121)

Placing the issue of guilt or innocence in this context without an unequivocal reference to the proposition that a defendant is presumed to be innocent, had effectively denied this Appellant, not recitation of a particular verbiage, but the shelter of the presumption of innocence itself.

There is hardly any need to cite authority for the proposition that the presumption of innocence is an essential ingredient in the American criminal justice system. IN RE WINSHIP, 397 U.S. 358 (1970). It is equally clear that this "axiomatic and elementary" principle co-exists with but is not satisfied by the reasonable doubt standard of proof. COFFIN v. UNITED STATES, 156 U.S. 432 (1895). In terms of the case at bar, the more significant aspect of COFFIN is not that a reasonable doubt charge does not salvage the failure to charge presumption of innocence, but rather the Court's conclusion that,

> "The presumption of innocence is evidence in favor of the accused, introduced by the law in his behalf." 156 U.S. at p.460.

Appellant's argument is that in a case where innocence or guilt hinges on the credibility of the accused against a single witness for the accusor, this vital evidence in his favor was discarded at the time that the jury was instructed

to apply the guiding legal principles to their deliberation on the factual issue.

There can be no question but that had exception been taken in the case at bar, the Court would have amended its charge. Failure to do so, here inconceivable, would certainly have resulted in reversible error. DODSON v. UNITED STATES, 23 F.2d 401 (4th Cir., 1928); HELTON v. UNITED STATES, 231 F.2d 654 (5th Cir., 1956). The question for this Court, therefore, is whether in this case the error affected substantial rights of the Appellant and were inconsistent with fairness and the integrity of the proceeding. Appellant again submits that, in this case, considered on its own peculiar set of facts, the presumption of innocence could have been of inestimable assistance. The Trial Court's unintentional failure to remind the jury of this presumption, it is respectfully submitted, was plain and reversible error.

## POINT II

THE TRIAL COURT'S ADMISSION OF LANGE'S HEARSAY DECLARATIONS THAT HIS CONTACT WOULD BE PRESENT AT THE JANUARY 6TH MEETING DID NOT FALL WITHIN ANY RECOGNIZED EXCEPTION TO THE RULE EXCLUDING HEARSAY AND, THEREFORE, VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM.

The Appellant, SAMUEL KAPLAN, contends that his Sixth Amendment right to confrontation was compromised when Agent Alleva, over specific objection of defense counsel, was permitted to testify as to a conversation with the deceased co-defendant, Lange, on January 5th, 1972. After relatively extensive debate on the admissibility of the conversation (A 22 - 32, 53 - 64), the Trial Court altered its original position (A 55) and allowed Agent Alleva to testify as follows:

"Q. Now, Agent Alleva, did you have a conversation with Frank Lange on the day previous, January 5th, 1972?

A. Yes, sir, I did.

Q. And where did this conversation take place?

A. It took place over the telephone.

Q. Did you call him or did he call you?

A. I called him.

Q. And can you tell us what you said to him and what did he say to you?

* * *

Q. You had a conversation with him over the phone; is that correct?

A. Yes, sir, that is correct.

Q. Tell us what you said to him.

A. I asked him about the quality of the next purchase.

And he said the quality would be very good.

I asked when and where, how we could, you know, perform the next purchase.

He told me that I should be at his residence at 2:00 p.m. the following day, which would be January 6th, at 2:00 p.m., and his connection would be there with him.

Q. Where was that?

A. I am sorry?

Q. Where was that he and his connection were supposed to be?

A. At this residence which was 1939 Homecrest Avenue in Brooklyn." (A 63 - 65)[7]
(Footnote on next page)

The remainder of the conversation to which Alleva testified concerned the poor quality of the merchandise supplied by Lange on an earlier occasion. (A 65 - 67)[8]

In the context of the Government's entire case against the Appellant, KAPLAN, the importance of Lange's alleged assertion that his "contact" would be present on January 6th cannot be de-emphasized. Indeed, it was the Government attorney who, in his untireable effort to have the statement admitted, characterized this testimony as "crucial" to his case. (A 23 - 24) The narrow, albeit significant, evidentiary question is whether admission of this January 5th conversation was reversible error.

As previously mentioned, considerable colloquy was spent on determining whether or not these clearly hearsay declarations should be excluded. During argument on the issue, the

[7]Omitted from the portion of the transcript quoted above is the Court's limiting instruction which will later be discussed in detail.

[8]With regard to this testimony also, there was a limiting instruction which was obviously appropriate because there was "no evidence whatsoever" that Appellant participated in any prior transactions. (T 66) However, the adequacy of any limiting instruction is a matter which similarly will be dealt with later.

Government attorney displayed extraordinary versatility when first advancing the position that these were statements of an alleged co-conspirator made during the course of and in furtherance of a joint criminal venture.[9] LUTWAK v. UNITED STATES, 344 U.S. 604 (1953). Failing in this effort, the prosecuting attorney offered the conversation on a "non-hearsay" approach:

> "MR. KAPLAN: As an alternative ground, as an offer of proof, I would submit in any event the statement would be admissible not as an exception to the hearsay rule, but generally to show the facts and circumstances of the purchase in question.
>
> THE COURT: Res gestae?
>
> MR. KAPLAN: That's right." (A 21)

Finally, after the Trial Court expressed substantial reluctance, the conversation was introduced on the latter theory of admissibility. With regard to the conversation, the Court gave the following limiting instruction:

> "Now ladies and gentlemen of the jury, as I understand, the witness is going to tell you something that Mr. Lange

[9] Although a conspiracy was not pleaded in the Indictment, aiding and abetting was charged. TITLE 18. UNITED STATES CODE, SECTION 2.

told him over the phone that preceding day.

Mr. Lange is not available to be cross-examined so that this defendant does not have his constitutional right to confront this person and to cross-examine him before you so you could watch him.

I am allowing this testimony, therefore, only so that, assuming you find it to be true, and that is entirely up to you, you will better understand what was in this witness' mind when he went to the home of Mr. Lange; is that clear, and what, if you believe him to be telling the truth, he expected to find there, so that you can evaluate the activities of this defendant-of this witness and the others in the room. But you are not to assume and you may not use this evidence to find that there has been any prior conversations between Mr. Lange and the defendant. Is that clear? There is no evidence at all of that from anything that this witness now decribes to you.

We don't know what was in Mr. Lange's mind and he is not here to tell us. It is only being introduced so that you understand what was in this witness' mind when he went into that room.

Any other further limitation?

MR. LA ROSSA: Nothing Further, Your Honor.

THE COURT: Thank you."

Shortly thereafter, with regard to the same conversation, the Court stated:

> "Again, ladies and gentlemen, there is no evidence whatsoever that this defendant had anything to do with any prior transaction that this witness may have had with Mr. Lange.
>
> I am allowing this evidence in only so that you can understand better what was in the witness' mind and perhaps in Mr. Lange's mind so you can better understand what was happening the next day if you credit his testimony.
>
> But there is no evidence whatsoever that this defendant had anything to do with any prior transaction or Mr. Lange prior to the day in which he was actually in the room with Mr. Lange." (A 66)

It was clearly the Court's intention that this conversation was not to be considered by the jury "in its hearsay sense". (A 56)

Appellant's argument in support of his position that admission of these declarations were reversible error, is two-dimensional. First, focusing on the Court's assertion that the conversation was admitted not as hearsay but as verbal utterances necessary for the jurors to grasp the events of January 6th, it is submitted that the probative value of this testimony was far outweighed by the resultant prejudice. Second, despite the Court's conscientious effort to avoid having the triers of the facts consider the declarations as

hearsay to establish the alleged truth of the fact that Lange's connection would be present on January 6th, it is unreasonable to believe that the jury could have accepted this distinction. Therefore, pragmatically, hearsay declarations which were not sufficiently connected to the Appellant were admitted against him. The realization that this would result was first articulated by the Trial Court:

> "THE COURT: "...I don't think the jury could accept it in a non-hearsay way. I think they would be bound to treat it as a hearsay declaration; in effect, that he intended to meet with Kaplan, and it can't be used that way. It's a tough problem. It would be interesting what the Court of Appeals would say on it." (A 25)[10]

The confrontation problem raised by the Appellant becomes even more acute because counsel voiced the objection that the agent's reports indicate that Lange had three or four sources of heroin and "one is drying up after another." (A 56)

[10]Earlier the Court, with reference to this argument, stated that "...I don't believe the jury can make the distinction as a practical matter." (A 23)

Authority for the non-hearsay approach to the admissibility of these statements ostensibly rested upon the Supreme Court's decision in MUTUAL LIFE INS. CO. v. HILLMON, 145 U.S. 285 (1892). From the MUTUAL LIFE case, there evolved a "state of mind" exception or alternative to the hearsay rule. As recently stated:

> "Technically, it is not even hearsay since it is not being admitted for the truth of the matter alleged."

UNITED STATES v. BROWN, 490 F.2d 758 (D.C. Cir., 1973). The BROWN decision, although essentially directed at another issue, dramatizes the problem at hand. First, on the question of relevance, it is submitted that what was in Alleva's mind when he went to Lange's house on January 6th was totally irrelevant to whether the Appellant, KAPLAN, was a participant in the sale. The jury had already heard that Alleva went to the Lange residence as a result of a phone call on January 5th. What Alleva further thought, therefore, was clearly not a "valid and relevant inquiry."

On the question of prejudice, the BROWN Court defined the consideration as whether,

> "...the statement if used by the jury for its improper purpose, is virtually

> dispositive of the case and extremely damaging to the position taken by the opponent of the admission of the evidence." 490 F.2d at p.764.

In the instant case, the jury, despite the cautionary instruction, could have well accepted this conversation as direct proof of the fact that KAPLAN would be the source of the narcotic on January 6th.

On the Appellant's allegation that this statement could only be considered by the jury on a hearsay basis, it is urged that the declaration did not fall within the co-conspirator exception to the hearsay rule. There is here not a scintilla of evidence that KAPLAN had engaged in an agreement with Lange on January 5th. As stated by this Court:

> "It is clear that [hearsay] statements are inadmissible when no independent evidence links the declarant to the defendant. (Citations omitted)" U.S. v. RAGLAND, 375 F.2d 471 (2nd Cir., 1971).

Despite the fact that there was no evidence to demonstrate that KAPLAN had entered into a joint venture with Lange on January 5th, Lange's statements of January 5th became evidence against the Appellant. The inability to confront Lange and cross-examine him on this critical evidence, it is submitted, denied

Appellant this very fundamental Sixth Amendment right. POINTER v. TEXAS, 380 U.S. 400 (1965).

## POINT III

### THE TRIAL COURT'S CHARGE ON THE ELEMENT OF KNOWLEDGE WAS INAPPROPRIATE IN THE CASE AT BAR AND IN EFFECT WAS AN INSTRUCTION TO THE JURY TO DISREGARD THE APPELLANT'S DEFENSE.

The Appellant, SAMUEL KAPLAN, testified that he was not involved in either the possession or sale of heroin on January 6th, 1972. Although present in the room when the narcotic was handed to Agent Alleva, KAPLAN verbalized his reaction in the following manner:

> "This is wrong. You guys are going to get everybody in trouble. Do this outside. You got your sister and mother home - and they left." (T 149)

The defense position, therefore, was that there came a time when the Appellant suspected what was occurring but chose to close his eyes to it. Accordingly, pursuant to the request of counsel, the Court charged that mere presence, even coupled with knowledge, is insufficient to sustain a conviction. NYE AND NISSEN v. UNITED STATES, 336 U.S. 613 (1949). However, with regard to the

essential element of knowledge, the Court instructed the jury as follows:

> "A critical issue in this case is knowledge. Did the defendant know that Lange had this narcotic when he went into the room? Did he know it was going to be distributed to this agent? The fact is that knowledge may be shown by direct or circumstantial evidence, just as any other fact in the case, and we have to determine that by what people do or say, because we can't look into their brains.
>
> This defendant has testified that he had no such knowledge. The Government contends that his actions showed that he did have such knowledge.
>
> One may not willfully and intentionally remain ignorant of a fact important and material to his conduct in order to escape the consequences of the criminal law. So if you find that the defendant acted knowingly, you may base that finding on the fact that he either actually knew it was heroin or that he deliberately closed his eyes to what he had every reason to believe was the fact. That's only with respect to knowledge. You still have to find all the other elements I have explained to you." (A 120 - 121)

This "conscious avoidance" charge has repeatedly and even recently been sustained by this Court. UNITED STATES v. OLIVERES-VEGA, ---F.2d --- (2nd Cir., April 3rd, 1974) sl.op. p.2657; UNITED STATES v. JOLY, 493 F.2d 672 (2nd Cir., 1974);

UNITED STATES v. SARANTOS, 455 F.2d 877 (2nd Cir., 1972); UNITED STATES v. ABRAMS, 427 F.2d 86 (2nd Cir., 1970).

It is clear, certainly, that these instructions are appropriate only where they receive the proper factual support. In concluding its opinion in JOLY, the Court emphasized that:

> "On these facts the jury was properly allowed to infer Joly's knowledge that he possessed cocaine." (Emphasis supplied)

In the instant case, it is submitted, the "conscious avoidance" instruction was entirely inappropriate. Here, the Appellant rested his defense on an assertion that at a particular time "he deliberately closed his eyes to what he had every reason to believe was the fact". Although the Court cautioned that knowledge was only one of the elements essential to returning a verdict of guilt, this explanation of law, which so closely parallelled the Appellant's defense, could reasonably have left the jury with the impression that KAPLAN's explanation was legally insufficient. For this reason, it is respectfully submitted, the Court's instruction in this regard constituted plain and reversible error. RULE 52(b), FEDERAL RULES OF CRIMINAL PROCEDURE.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that Appellant's conviction should be reversed and the case remanded for a new trial.

Respectfully submitted,

LA ROSSA, SHARGEL & FISCHETTI
Attorneys for Defendant-Appellant.

GERALD L. SHARGEL
Of Counsel

Service of ~~three (3)~~ two (2) copies of the within
is hereby admitted

this day of

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Attorney(s) for